Wong Li Fatt William (an infant) v Haidawati bte Bolhen & Anor

HIGH COURT (KUCHING) — SUIT NO KG 36 OF 1989
RICHARD MALANJUM J
16 MAY 1994

Tort *— Negligence — Road accident — Whether defendant had failed to keep proper look out — Whether defendant in reasonable control of car — Whether failure to observe s 23 of Highway Code — Highway Code s 23*

Tort *— Vicarious liability — Road accident — Whether car owner vicariously liable for negligence of driver*

Tort *— Negligence — Contributory negligence — Plaintiff a three-year-old infant — Whether liable for contributory negligence*

Damages (Personal Injury or Death) *— Personal injuries — Severe brain damage — Spastic paralysis — Pain and suffering — Loss of amenities — Factors taken into account*

Damages (Personal Injury or Death) *— Personal injuries — Severe brain damage — Spastic paralysis — Nursing care — Past and future — Services rendered by mother of plaintiff*

Damages (Personal Injury or Death) *— Personal injuries — Severe brain damage — Spastic paralysis — Special damages — Wheelchair — Medical treatment in Singapore — Transport — Acupuncture — What is recoverable*

Damages (Personal Injury or Death) *— Personal injuries — Medical expenses incurred in Singapore — Whether exchange rate applicable at time of loss or date of judgment*

Damages (Personal Injury or Death) *— Personal injuries — Interest — General damages — Rules of the High Court 1980 O 42 r 12*

The plaintiff's father sued as the next friend of his three-year-old son ('the infant plaintiff') who was hit by a car driven by the first defendant and owned by the second defendant. It was not disputed that the weather was fine on the day in question, the road straight and visibility unobstructed for about 250m before the point of impact.

The infant plaintiff suffered severe brain damage and epilepsy secondary to the head injury and was prognosed as being dependent on others for his basic needs for the rest of his life. Acording to the medical reports, he could feel pain but was unaware of his condition or that he was suffering. His life-span was also shortened as a result of his injuries. The infant plaintiff sued for pain and suffering and loss of amenities, cost of past and future nursing care and special damages.

Held, awarding damages to the plaintiff:

(1) The first defendant used that road daily and knew that the area was inhabited. Therefore, she should have put herself in a position where she could have halted the car in the event of an emergency. Furthermore, if she had kept a proper look out and had been travelling at a speed within her control, she would have been able to avoid knocking down the infant plaintiff. As such, she had failed to observe s 23 of the Highway Code. The first defendant also failed to warn the infant plaintiff of her presence either by sounding the horn or flashing the headlights of the car.

(2) The irresistible conclusion was that the first defendant was negligent, and the second defendant, being the registered owner of the car, was therefore vicariously liable for her negligence. The liability of both defendants should be joint and several as prayed for in the statement of claim.

(3) No contributory negligence or blame was attributable to the infant plaintiff. As he had been only two years and eleven months old at the time, no duty to take care of his own safety was imposed upon him. The defendants had also not proved that the infant plaintiff had shown a culpable want of care for his own safety.

(4) In respect of damages for pain and suffering and loss of amenities, the sum of RM190,000 was awarded, bearing in mind that the fact of deprivation is taken as a substantial loss and in view of the current trend of awards for this head of damages. In assessing the damages, the court took into account the fact that the infant plaintiff could feel pain although unaware of his condition, the medical opinion that his physical condition would deteriorate and the fall of the value of money.

(5) As for the cost of past nursing care, the court awarded the sum of RM260 per month for 12 months (ie the period for which the infant plaintiff's father had helpers working for him) and subsequently, RM300 per month until the date of judgment for services rendered by the infant plaintiff's mother in looking after him, taking into account the fact that she would still have had to take care of him even if he had not been injured. As for the cost of future nursing care, the sum of RM300 per month was awarded and, adopting a multiplier of 10, this amounted to RM36,000.

(6) As for special damages, inter alia, RM2,100 was allowed for a wheelchair and reclining chairs; RM300 for transport charges to the hospital; RM520 for air fares to seek treatment in Singapore; S$7,764.10 for medical expenses incurred in Singapore; and RM20 for damaged clothing and shoes. The claims for a special bed, special food and nourishment, Chinese medium's fees, acupuncture and massage were not allowed. The plaintiff's failure to produce receipts of purchases was not fatal considering he was just a village folk.

(7) Although the medical expenses in Singapore were incurred in February 1988, the sum was not due and payable prior to judgment. Therefore, the exchange rate should be taken at the date of judgment and not at the time of loss.

(8) Interest at the rate of 6%pa was awarded on the general damages for pain and suffering and loss of amenities from the date of service of writ to the date of judgment, and thereafter at the rate of 8%pa until satisfaction pursuant to O 42 r 12 of the Rules of the High Court 1980.

[Bahasa Malaysia summary

Bapa plaintif telah membawa dakwaan ini sebagai sahabat wakil anak lelakinya yang berumur tiga tahun ('budak plaintif itu') yang telah dilanggar oleh kereta yang dipandu oleh defendan pertama dan dimiliki oleh defendan kedua. Adalah tidak dipertikaikan bahawa cuaca hari yang berkenaan baik, jalan itu lurus dan penglihatan tidak dihalang sejauh 250m sebelum tempat di mana perlangaraan itu berlaku.

Budak plaintif itu telah mengalami kerosakan otak yang teruk dan epilepsi sebagai akibat kerosakan otak itu dan telah diprognosis bahawa beliau terpaksa bergantung kepada orang lain untuk keperluan asasnya buat seumur hidupnya. Mengikut laporan perubatan, beliau boleh berasa kesakitan tetapi tidak sedar akan keadaannya ataupun bahawa beliau sedang mengalami penderitaan. Jangka hayatnya juga telah dipendekkan sebagai akibat kecederaannya. Budak plaintif itu telah mendakwa untuk kesakitan dan penderitaan dan kehilangan kebolehan mental dan fizikalnya (loss of amenities), kos jagaan kejururawatan yang sudah ditanggung dan akan ditanggung pada masa akan datang dan ganti rugi khas.

Diputuskan, mengawardkan ganti rugi kepada plaintif:

(1) Defendan pertama menggunakan jalan itu setiap hari dan tahu bahawa kawasan itu dihuni orang. Oleh itu, beliau sepatutnya meletakkan dirinya di dalam kedudukan di mana beliau boleh menghentikan kereta itu jika berlaku sesuatu kecemasan. Lebih-lebih lagi, jika beliau berjaga-jaga dan memandu pada kelajuan di mana beliau boleh mengawal keretanya, beliau akan dapat mengelak daripada melanggar budak plaintif itu. Dengan demikian, beliau juga gagal mematuhi s 23 Kanun Lebuhraya. Defendan pertama juga gagal memberi amaran kepada budak plaintif itu dengan membunyikan hon atau menyalakan lampu besar keretanya.

(2) Keputusan yang tidak dapat dielakkan adalah bahawa defendan pertama cuai, dan dengan itu defendan kedua, yang merupakan tuan punya berdaftar kereta itu, juga menanggung liabiliti vicarius untuk kecuaian defendan pertama. Liabiliti kedua-dua defendan

adalah bersesama dan berasingan seperti yang dipohon di dalam pernyataan tuntutan. A

(3) Budak plaintif itu tidak boleh dipersalahkan atau dikenakan liabiliti untuk kecuaian sertaan. Oleh kerana beliau hanya berumur dua tahun sebelas bulan pada masa itu, tidak ada tanggungjawab untuk menjaga keselamatan dirinya yang dikenakan ke atasnya. B Defendan juga tidak membuktikan bahawa budak plaintif itu bersalah kerana gagal menjaga keselamatan dirinya.

(4) Berkenaan dengan ganti rugi untuk kesakitan dan penderitaan dan kehilangan kebolehan mental dan fizikal, jumlah sebanyak RM190,000 diawardkan, dengan mengingati bahawa hakikat kehilangan itu diambil sebagai suatu kehilangan substansial dan C memandangkan arah aliran award untuk ganti rugi seperti ini. Apabila mentaksirkan ganti rugi, mahkamah mengambil kira hakikat bahawa budak plaintif itu boleh berasa kesakitan walaupun tidak menyedari akan keadaannya, pendapat perubatan bahawa keadaan fizikalnya akan merosot dan kejatuhan di dalam nilai D wang.

(5) Untuk kos jagaan kejururawatan yang sudahpun ditanggung, mahkamah mengaward jumlah sebanyak RM260 sebulan selama 12 bulan (iaitu tempoh apabila bapa budak plaintif mempunyai beberapa orang pembantu untuk membantunya) dan kemudiannya, RM300 sebulan sehingga tarikh penghakiman untuk E perkhidmatan yang diberikan oleh ibu budak plaintif untuk menjaganya, dengan mengambil kira hakikat bahawa beliau masih perlu menjaganya sekalipun budak plaintif itu tidak tercedera. Berkenaan dengan kos jagaan kejururawatan pada masa akan datang, jumlah sebanyak RM300 sebulan diaward dan, dengan F mengambil pengganda (multiplier) sebagai 10, jumlahnya adalah RM36,000.

(6) Untuk ganti rugi khas, antara lain, RM2,100 dibenarkan untuk sebuah kerusi roda dan kerusi yang dapat direbahkan; RM300 untuk kos pengangkutan ke hospital; RM520 sebagai tambang kapalterbang untuk mendapat rawatan di Singapura; S$7,764.10 G untuk perbelanjaan perubatan di Singapura; dan RM20 untuk pakaian dan kasut yang rosak. Tuntutan untuk sebuah katil khas, makanan khas yang berkhasiat, fee perantara Cina, akupunkture dan urut tidak dibenarkan. Kegagalan plaintif untuk mengemukakan resit bagi pembeliannya tidak membawa padah H memandangkan beliau hanya orang kampung.

(7) Walaupun perbelanjaan perubatan di Singapura telah ditanggung pada Februari 1988, jumlah itu tidak kena dibayar sebelum penghakiman diberikan. Oleh itu, kadar pertukaran sepatutnya diambil pada tarikh penghakiman dan bukan pada masa kehilangan I itu dialami.

(8) Faedah pada kadar 6% setahun diawardkan atas ganti rugi am untuk kesakitan dan penderitaan dan kehilangan kebolehan mental

dan fizikal dari tarikh penyampaian writ hingga tarikh penghakiman, dan seterusnya pada kadar 8% setahun hingga penyelesaian mengikut A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980.]

[*Editorial Note*: The defendants have appealed to the Supreme Court.]

Notes

For cases on negligence in road accidents, see 12 *Mallal's Digest* (4th Ed) paras 285–293, 298, 302–304, 392–573; [1990] Mallal's Digest 1182-1183, 1190, 1192; [1991] Mallal's Digest 1964; and [1992] Mallal's Digest 1656–1662.

For cases on vicarious liability, see 12 *Mallal's Digest* (4th Ed) paras 297 and 708–729.

For cases on damages for personal injuries, see 1 *Mallal's Digest* (4th Ed) paras 1821–1825; [1989] Mallal's Digest 661–733; [1990] Mallal's Digest 498–503; 516–575; [1991] Mallal's Digest 970–974, 986–988, 990–1036; and [1992] Mallal's Digest 860–913.

Cases referred to

1 *Mohamed Salleh bin Awang & Anor v Low Han Leong & Anor* [1982] 1 MLJ 82 (refd)
2 *Yahaya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117 (refd)
3 *Tey Siew Goh v Tay Tian Soo* [1965] 1 MLJ 21 (refd)
4 *Jones v Lawrence* [1969] 3 All ER 267 (folld)
5 *Symes v Ling Ngan Ngieng* [1966] 2 MLJ 149 (folld)
6 *Gough v Thorne* [1966] 3 All ER 398; [1966] 1 WLR 1387 (folld)
7 *Tham Yew Heng & Anor v Chong Toh Cheng* [1985] 1 MLJ 408 (folld)
8 *Tan Guan Cheng & Anor v Kuala Lumpur, Klang & Port Swettenham Omnibus Co Ltd* [1971] 1 MLJ 49 (folld)
9 *Ho Kiong Chan v Patipet* [1966] MLJ 159 (distd)
10 *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910; [1980] AC 174; [1979] 3 WLR 44 (folld)
11 *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 (folld)
12 *H West & Son Ltd v Shephard* [1964] AC 326; [1963] 2 All ER 625; [1963] 2 WLR 1359 (folld)
13 *Liong Thoo v Sawiyah & Ors* [1982] 1 MLJ 286 (refd)
14 *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292 (refd)
15 *Taylor v Bristol Omnibus Co Ltd* [1975] 1 WLR 1054 (folld)
16 *Raja Zam Zam v Vaithiyanathan* [1965] 2 MLJ 252 (refd)
17 *Tiong Ing Chiong v Giovanni Vinneti* [1984] 2 MLJ 169 (folld)
18 *Ooi Han Sun & Anor v Bee Hua Meng* [1991] 3 MLJ 219 (folld)
19 *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 (folld)

Thomas Ong (*Sim & Yee Advocates*) for the plaintiff.
Peter Mijim (*Battenberg & Talma*) for the defendant.

Cur Adv Vult

Richard Malanjum J:

A Introduction

This is an action by the infant plaintiff (hereinafter referred to as 'the infant plaintiff') suing by his next friend, Wong Chin Yong, who is his father, against the first and second defendants. The claims are jointly and severally for damages (both general and special), interest and costs pertaining to the head injury sustained by the infant plaintiff as a result of him being knocked down by a car no KN 2021 (hereinafter referred to as 'the said car') owned by the second defendant and driven by the first defendant on 17 September 1987 at about 5.45pm along Muara Tuang Road, Kuching.

B The undisputed facts

It was not in dispute that at the time when the infant plaintiff was knocked down, he was just short of three days to his third birthday, having been born on 20 September 1984.

The other undisputed facts are as follows:

(i) that the infant plaintiff was on his way home together with his two elder brothers when he was knocked down by the said car;
(ii) that the infant plaintiff was crossing the Muara Tuang Road and was about a meter to the other side of the road which he was heading for when he was knocked down;
(iii) that there were grass fringes on both sides of the road;
(iv) that the weather was fine;
(v) that the road was straight and visibility unobstructed for about 250m before the point of impact;
(vi) that it was the first defendant who provided the information to the police, thereby resulting in a sketch plan being drawn up; and
(vii) that before the infant plaintiff was knocked down, the first defendant did not sound the horn or flash the headlights of the said car.

C The contentions on liability

Due to the head injury sustained by the infant plaintiff, he could not testify in this trial. But even if he could, his tender age at the time of the collision would have caused some difficulties for him to recall it. Anyway, it was contended for the infant plaintiff that he was knocked down by the first defendant due to her negligent driving. The first and second defendants are disputing this allegation. Thus, it is incumbent on me to consider first the issue of liability of the defendants.

In para 3 of the statement of claim, seven particulars were given as the basis for the averment of negligence on the part of the first defendant. The particulars are as follows:

(a) driving too fast in the circumstances;
(b) failing to keep any or any proper lookout or to observe or heed the presence of the said William Wong Li Fatt;
(c) failing to keep her motor car no KN 2021 under proper control and/or to exercise reasonable care and skill in the driving of the said motor car no KN 2021;
(d) failing to see the said William Wong Li Fatt in sufficient time to avoid knocking against the said William Wong Li Fatt or at all;
(e) failing to apply her brake in time or at all or to steer or swerve or to slow down her motor car no KN 2021 or take any reasonable step so as to avoid the said accident;
(f) failing to exercise reasonable prudence and skill in the circumstances; and
(g) so far as may be necessary the plaintiff will rely on the doctrine of res ipsa loquitur and the Road Traffic Ordinance and the Highway Code applicable to drivers of motor vehicles.

(1) PARAGRAPH 3, PARTICULARS (A), (C), (E), (F) AND (G) OF THE STATEMENT OF CLAIM

I will consider particulars (a), (c), (e), (f) and (g) together as they are interrelated to a great extent.

It was not disputed by the defence that the vicinity where the infant plaintiff was knocked down was not entirely without any inhabitants. Indeed there was a factory nearby and houses along that particular stretch of the Muara Tuang Road. However no evidence was adduced on the presence of speed limit in the area. But one matter was clear. The first defendant used that road daily as she was then living in Kota Samarahan while pursuing a typing course in Kuching. Thus, it can be safely inferred that she must be familiar with the area. After all she admitted that she was familiar with the road in question. The questions to be considered are therefore as follows:

(a) What was the probable speed of the said car at the material time?
(b) Whether the first defendant was in reasonable control of the said car while at the speed she was driving.

(a) *What was the probable speed of the said car at the material time?*

(i) The evidence

PW1, Henry Wong Lee Tong, testified for the infant plaintiff that when he first saw the said car it was travelling very fast. The said car was about 100ft away from him. He was on the grass fringe of the road. As for PW2, Sgt No 77978, Edward Pangga, he gave evidence that he drew the sketch plan of the place of incident based on the information provided by the first defendant. The sketch plan together with the key to it were admitted and marked as exhs P1 and P1K, respectively. According to PW2, the tyre marks as shown in exh P1 measured up to 23.2m in length. The width of

the road was 7.4m while the grass fringe was about 3ft wide. But PW2 admitted that he did not measure the grass fringe. I noted that there was no question by the learned counsel for the defendants regarding the marks in exh P1 which were described as tyre marks of the said car.

PW3, David Wong Lee Chiang, also testified that the said car was about 70m away from him when he first saw it. It was travelling very fast. According to PW3, the grass fringe was about 6ft in width which separated the main road and a small side road. PW3 further said that when he first saw the said car he was walking on the grass fringe towards the edge of the main road after running along the small side road.

But the first defendant in her evidence said that at that time she was travelling at the speed of about 65km per hour. And she said that the infant plaintiff was about 1m in front of the said car before he was knocked down. According to the first defendant, she did apply her brakes when she saw the infant plaintiff. But she denied that the tyre marks as shown in exh P1 were all hers. This stand of course came as a surprise since no question along such lines was put to PW2 by the learned counsel for the defendants. The first defendant went on to say that her tyre marks only started from the point when she first saw the infant plaintiff, that is, from Point D in exh P1. The first defendant also stated that after the infant plaintiff was knocked down he fell down at Point X in exh P1.

Under cross-examination, the first defendant said that the road was straight for a distance of 250m before the point where the infant plaintiff was knocked down. From that distance, she could see clearly. The first defendant also said that from that distance she could also see the grass fringes but she did not see the three boys including the infant plaintiff. It was the evidence of the first defendant that the said infant plaintiff ran very fast across the road. She also confirmed that the other two boys did not run across the grass fringe.

(ii) The findings

Having considered the evidence adduced for the infant plaintiff and the defence, I could not believe that the first defendant was travelling at about 65km per hour when she first saw the said infant plaintiff. The evidence of PW1 and PW3 that the said car was travelling very fast would be the more probable account and I do believe them. I also find the first defendant to be inconsistent in her evidence. She said that by the time she saw the infant plaintiff it was too near for her to brake the said car. But she also admitted that part of the tyre marks as indicated in exh P1 were hers. Thus, it is my finding on the balance of probabilities that the tyre marks as measured by PW2 to be 23.2m and indicated in exh P1 must be that of the said car. (See *Mohamed Salleh bin Awang & Anor v Low Han Leong & Anor*[1] and *Yahaya bin Mohamad v Chin Tuan Nam.*[2])

Further, I also believed the evidence that PW1 and PW3 were about 100ft away when they first saw the said car. Yet the first defendant could not stop it without having to knock down the infant plaintiff.

Based on the foregoing findings, I am therefore of the view that on the balance of probabilities, the first defendant must have been travelling at a speed of more than 65km per hour at the material time.

(b) *Whether the first defendant was in reasonable control of the said car while at the speed she was driving*

There was no evidence adduced as to the speed limit along that stretch of the road where the infant plaintiff was knocked down. But from the undisputed evidence, the area was also inhabited. Thus the first defendant should have anticipated that she could be put on an emergency situation at any time while passing that area. And she should have put herself in a position where she could halt the said car in the event of such an emergency situation occurring. (See *Tey Siew Goh v Tay Tian Soo.*[3]) But from the evidence adduced, the first defendant appeared to have failed to meet such obligations. If she had been travelling at a speed within her control then, on seeing the boys about 100ft away, such distance in my view would have given her sufficient time to take the necessary emergency precaution so as to be able to stop the said car before knocking down the infant plaintiff. But she could not do so and in my opinion she had failed to observe s 23 of the Highway Code which states:

> A good driver adjusts his speed to road conditions. You should reduce your speed to suit road conditions so that you can stop in any emergency without skidding or losing control.
>
> A good driver automatically reduces his speed when entering a build-up area, when approaching a school or a bus with children alighting or boarding, on narrow winding roads, approaching children who are playing, approaching a bend, brow of hill, or any other obstruction that limits his view.

The first defendant also failed to warn the boys of her presence either by sounding the horn or flashing the headlights of the said car. Obviously the speed was too high for her to be able to take such moves. It is therefore my finding on the balance of probabilities that the first defendant was not in reasonable control of the said car while at the speed she was driving it at the material time.

(c) *Conclusion*

Based on my findings on the foregoing questions (a) and (b), it is my conclusion and judgement that the infant plaintiff has established, on the balance of probabilities, the particulars averred in para 3 (a), (c), (e), (f) and (g) of the statement of claim.

(2) PARAGRAPH 3, PARTICULARS (B) AND (D) OF THE STATEMENT OF CLAIM

The first defendant admitted that she was familiar with the road where the infant plaintiff was knocked down. And from the undisputed facts pertaining to the fine weather, the grass fringes, the straight road and unobstructed view for a distance of 250m before the point of impact, it is inconceivable

that the first defendant could not have seen the infant plaintiff in sufficient time for her to reduce her speed so as to avoid knocking him down. In her testimony, the first defendant said that the infant plaintiff suddenly ran across the road. But it was also not in dispute that the point of impact was a little over 1m before the infant plaintiff would have reached the other side of the road. As it was not contested that the road had a width of 7.4m, it would mean that the infant plaintiff must have covered 6m of the road before he was knocked down. For a child of about three years old and even running at his best, it would have taken a longer time to cover that 6m. Yet the first defendant said that the first time when she saw the infant plaintiff was at Point D in exh P1. And before pointing to Point D in exh P1, the first defendant did say that the infant plaintiff was about 1m away from the front of the said car before he was knocked down. Could it therefore mean that the first defendant did not see the infant plaintiff until he was in front of the said car? Or would it be possible that the infant plaintiff ran so fast that within a split second he was in front of the said car? Given the condition of the road, it is my finding on the balance of probabilities that the first defendant would have seen the infant plaintiff at the earliest opportunity if she had kept a proper look out. In this case she would have seen the infant plaintiff when she was at least about 100ft away before the point of impact.

No doubt PW1, under cross-examination, agreed to the suggestions of learned counsel for the defendants that the infant plaintiff darted into the road and he and PW3 were chasing him. But even if that was true, I am of the view that based on the point of impact, the infant plaintiff must have taken quite a while to reach there as he had to cross the grass fringe as well. If, therefore, the first defendant had beeen on a proper look out coupled with a speed which was within her control, then she would have been able to slow down or halt so as to avoid knocking down the infant plaintiff. (See *Jones v Lawrence.*[4])

It is therefore my finding that the infant plaintiff has established, on the balance of probabilities, the allegations as stated in para 3, particulars (b) and (d) of the statement of claim. I have also noted the fact that on that fateful day, the first defendant had been driving around Kuching the whole day and her aunty was with her in the said car.

D Conclusion on the issue of liability

On the basis of my findings on the particulars of negligence as stated in para 3 of the statement of claim, the irresistible conclusion is that the first defendant was negligent, thereby knocking down the infant plaintiff. She is therefore liable for the pain, head injury, loss and damages suffered by the infant plaintiff. And, being the registered owner of the said car, the second defendant is therefore vicariously liable, as a consequence, for the negligence of the first defendant. I also rule that the liability of both the defendants should be jointly and severally as was prayed for in the statement of claim.

A **E Contributory negligence**

It was contended on behalf of the defendants that the infant plaintiff was either solely responsible or contributed to the occurrence of the collision. Learned counsel further submitted that the age of a child should not be a 'status conferring right' and that the test for contributory negligence should B be the same in the case of a child as of an adult modified only to the extent that the degree of care to be expected must be proportionate to the age of the child. Thus, even based on the submission of the learned counsel for the defendants, it is the age of the infant plaintiff that should be considered in determining the degree of care that should be expected of him.

C In the case of *Jones v Lawrence*,[4] a boy of seven years and three months who was knocked down by a 500cc motor cycle was not found to have contributed to his misfortune although it was in evidence that the boy crossed the road from behind a parked van which obstructed the view of the motorcyclist. The learned trial judge in that case was of the opinion that it was for the defendant as a matter of probability to prove that the boy D showed a culpable want of care for his safety.

From the other decided cases submitted by the learned counsel for the defendants, the age factor was duly considered in determining whether or not the young plaintiffs in those cases were negligent or contributed to the collisions. In *Symes v Ling Ngan Ngieng*,[5] the learned trial judge refused to E apportion any negligence on the child due to her age. And in *Gough v Thorne*,[6] the English Court of Appeal did not attribute any negligence on the part of a 13-year-old girl who relied on the signal of the lorry driver to cross the road instead of seeing for herself whether or not it was safe to do so.

F A boy of nine years was also considered to be hardly expected to be able to judge accurately the speed and distance of an oncoming car: *Tham Yew Heng & Anor v Chong Toh Cheng*.[7] In *Tan Guan Cheng & Anor v Kuala Lumpur, Klang & Port Swettenham Omnibus Co Ltd*,[8] Abdul Hamid Omar J also considered the age of the boy who was then eight years old to be the reason for not attaching any blame on him for his misfortune.

G In the present case, the infant plaintiff was only two years and eleven months old when he was knocked down. For that tender age, I do not think any reasonable person should impose upon him the duty to take care of his own safety. He could not be expected to judge the speed and the distance of the said car at that time. Furthermore, I am not satisfied that the H defendants have proven that the infant plaintiff had shown a culpable want of care for his own safety. As stated earlier on that if the first defendant was in control of the speed of the said car and on a proper look out since she was familiar with the road, the collision might not have happened. I do not think therefore that any blame should be attributed to the infant plaintiff in this case.

I Learned counsel for the defendants cited the case of *Ho Kiong Chan v Patipet*[9] to support his contention that a child of eight years can be made

responsible for his own misfortune. However in that case the Federal Court was of the view that in the first place no negligence was established against the defendant. Thus, the question of apportioning any blame on the boy was secondary. I do not consider that case as relevant in considering the present case.

F Quantum of damages

In considering the issue of quantum of damages, I bear in mind that an award must be fair which means that there must be a proper compensation for the injury suffered and the loss sustained.

In *Lim Poh Choo v Camden and Islington Area Health Authority*,[10] Lord Scarmen said this at p 917:

> ... the principle of the law is that compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong ... There is no room here for considering the consequence of a high award on the wrongdoer or those who finance him.

In all, there were three medical reports on the infant plaintiff tendered in this trial without any objection from the defence.

The first medical report dated 2 April 1988 (exh P12) was prepared and signed by Mr Mohd Hirman Ritom (PW5) who was then a consultant surgeon in the Sarawak General Hospital Kuching at the material time. The report (exh P12) disclosed that the infant plaintiff was admitted to the intensive care unit of the hospital at 6.30pm on 17 September 1987. On admission, the infant plaintiff was unconscious with clinical evidence of brain stem compression. He also developed fits while in the ward even though he was unconscious. According to PW5 who testified in connection with his report (exh P12), the head injury of the infant plaintiff was very severe as the Glasgow Coma Scale was 3 out of the normal score of 14. On further examination after admission by way of exploratory craniotomy, the brain of the infant plaintiff was found to be swollen (intense cerebral edema). The post-operative diagnosis was that of 'gross intracerebral injury secondary due to intracerebral trauma from a road traffic accident', that is, the infant plaintiff suffered brain injury.

PW5 also testified that as the injury to the infant plaintiff was very severe, nothing better could have been done other than what was done for him after his admission. And according to this witness, the condition of the infant plaintiff had nothing to do with any delay in medical attention. PW5 also said that the infant plaintiff was ventilated from the time he was operated after admission. It was necessary in order to support and sustain his respiratory system. As for the fits of the infant plaintiff, medications did not help. PW5 went on to say that as of 21 October 1987, the infant plaintiff could only respond to deep pain.

Under cross-examination, PW5 said that the infant plaintiff suffered spastic paralysis. He could not move consciously by himself and there was

no chance of recovery. He was only responding to pain on 24 December 1987 when he was discharged from the hospital.

On re-examination, PW5 stated that a person under such a condition as the infant plaintiff generally has a shorter life-span.

The next medical report dated 31 July 1989 (exh P13) was signed by Dr Hss Amar Singh who was a paediatrician in the Sarawak General Hospital at that time. It was admitted as an agreed document.

The diagnosis of the infant plaintiff as stated in exh P13 was that he had severe brain damage and epilepsy secondary to a head injury. Exh P13 further disclosed that the infant plaintiff had one to two grandmal fits every week which could not be controlled even with the use of three anti-convulsants concurrently.

On the neurological status of the infant plaintiff, exh P13 stated as follows:

> Neurological status
>
> (a) Vision.
> Not able to fix on mother's face or light source. Possible optic atrophy. No threaten response. Impression: possibly blind.
> (b) Speech/hearing.
> No speech at all. Makes incomprehensible sounds. Can respond to loud sounds with startle response.
> (c) Social skills.
> Not able to communicate for basic needs, ie not able to indicate hunger, need for micturation, etc. At times, smiles when hears favourite music.
> (d) Physical (motor development and locomotion).
> Not able to sit or roll over. Not able to grasp or hold any objects. Hands kept fisted. Make extensor spasm of body. Contracture of right knee and left ankle. Hyperreflexic, with left more than right. Ankle clonus present right side. Right, partial seventh cranial paresis. Not able to take solids — possible bulbar paresis.

As for the prognosis it was given thus:

> Prognosis/outcome
>
> In the past one year, Lee Fatt's only achievements have been the ability to smile responsively and make incomprehensible sounds. We do not expect any further improvement.

Exh P13 concluded that the infant plaintiff was badly handicapped and would not be able to relate to his parents or surroundings. He will require continued medical attention for his convulsions and will be dependent on others for all his basic needs for the rest of his life. His condition will not improve.

PW6, Dr Oo Swee Khoon, also a paediatrician with the Sarawak General Hospital, gave evidence on the condition of the infant plaintiff after being examined on 24 December 1993. He prepared a medical report which was admitted as exh P14. The report disclosed as follows:

Current status

(1) Convulsions

Fits about once a week. Now fits better controlled and on tablet Carbamazepine 100mg tds.

(2) Neurological status

(a) Vision

Not able to fixate on his mother's face.

(b) Speech/hearing

No speech at all since the accident. Now only making incomprehensible sounds.

(c) Social skills

Not able to perform activities of daily living. Totally dependent on the care of parents.

(d) Physical (motor development and locomotion)

Wheelchair-bound; pectus excavation with kyphoscoliosis; marked spasticity of all the limbs with contractive; currently we attempt to control the spasticity with Baclofen 100mg tds.

(3) Prognosis/outcome

There is no marked improvement of the child's condition since the accident. In fact, his condition is getting worse with the pectus excavation and kyphoscoliosis and this predisposes him to chest infections and breathing difficulties.

In summary, Wong Lee Fatt is severely brain damaged by the trauma to his head. He will need continuous medical attention for his epilepsy and spasticity. He is dependent on others for his daily needs. His long term prognosis is very poor.

PW6 also expressed his opinion/finding on the infant plaintiff as follows that:

(i) the fits of the infant plaintiff could only be controlled and without any cure;
(ii) he cannot recognize anything;
(iii) although not totally blind he would not blink if a test was done in front of his face;
(iv) there would be no chance of improvement for the infant plaintiff;
(v) his condition is worse than a young baby since he cannot indicate when he wants to urinate or pass motion;
(vi) his food has to be on soft diet as he cannot swallow solid food;
(vii) he will also be wheelchair-bound or bedridden;
(viii) due to the decrease in the lung volume the infant plaintiff will be susceptible to chest infections and will also have breathing difficulties; and
(ix) the long term effect is that his life-span will be shortened.

When questioned by the court, PW6 said that the infant plaintiff does feel pain but is not aware of his condition or that he is suffering.

The medical reports and the testimonies of two of the makers left me in no doubt that these evidence were given so as to assist the court in coming

to a fair assessment of damages that should be payable to the infant plaintiff. I have no hesitation to rely on them where appropriate.

I will now proceed to deal with the respective heads of damages.

(1) THE AWARD FOR PAIN AND SUFFERING AND LOSS OF AMENITIES

It was the submission of the learned counsel for the plaintiff that the recent trend of our courts in the awards of damages for injuries similar to that of the infant plaintiff had been in the region of RM180,000 for pain and suffering and loss of amenities. The case of *Marappan & Anor v Siti Rahmah bte Ibrahim*[11] was cited as the recent attitude of the Supreme Court on this head of damages. In that case, the award of RM180,000 for pain and suffering and loss of amenities given by the High Court was not disturbed on appeal. But a caution must be taken here. There was no complaint against that particular award from the appellant in that case. Anyway, the injury sustained by the plaintiff in that case was also a severe head injury which left her comatose for a period of time. As a result, the plaintiff was completely vegetative and bedridden. She also had seizures. Indeed there is similarity in the injury sustained in that case to the injury suffered by the infant plaintiff in this case. However, I think that in the present case, the infant plaintiff is in a worse off situation as, according to PW6, he can feel pain although he is not aware of his condition. It was also the opinion of PW6 that the physical condition of the infant plaintiff would deteriorate, such as having a depression on the chest and bent spine. In *H West & Son Ltd v Shephard*,[12] Lord Pearce said this at p 365, 'Past and prospective pain and discomfort increase the assessment'.

Learned counsel for the defendants submitted several cases which indicated the general damages awarded to plaintiffs who also suffered head or brain injuries. My first observation was that those cases were decided a couple of years back and the fall of the value of money since then should be taken into account. 'The award has to be one which represents a comparable amount in current money values at the time when the award is made' per Chan J in *Liong Thoo v Sawiyah & Ors*[13] at p 287I. For instance, learned counsel cited the case of *Yang Salbiah & Anor v Jamil bin Harun*[14] in which the award in 1981 for pain and suffering and loss of amenities was RM70,000. The plaintiff in that case was also a girl of seven years at the time of the accident. She suffered traumatic cerebral damage resulting in her becoming a severely mentally retarded child.

Bearing in mind that it is the fact of deprivation which should be taken as a substantial loss (see *Lim Poh Choo*'s case[10]) and in view of the current trend of awards for this head of damages, in my judgment the sum of RM190,000 should be sufficient and appropriate for the pain and suffering and loss of amenities which had befallen the infant plaintiff.

(2) COST OF NURSING CARE FOR THE PAST AND THE FUTURE

PW4, Wong Chin Yong, the father of the infant plaintiff, testified that he had employed several helpers to take care of the infant plaintiff even before

he was taken to Singapore for further medical treatment on 22 February 1988. It was not in dispute that the infant plaintiff was discharged from the Sarawak General Hospital on 24 December 1987. According to PW4, he was paying the helpers the sum of RM260 per month. But due to the difficulties in taking care of the infant plaintiff, it is his wife now who is taking care of him. In such a situation, it is settled law that compensation can be given for services rendered by parents. (See *Marappan*'s case;[11] *Taylor v Bristol Omnibus Co Ltd.*[15])

For the defendants, learned counsel submitted that nothing should be paid under this head of damages. His reason was that such a claim was not pleaded in the statement of claim. Alternatively, learned counsel said that since the claim was put under the head of special damages no evidence was adduced to support it. However, amendments were subsequently done by the learned counsel for the infant plaintiff which was not objected to by the learned counsel for the defendants. Thus, the first argument is now without merit. (See also *Raja Zam Zam v Vaithiyanathan.*[16]) As for the alternative argument it is also without any basis as PW4 did testify that he paid RM260 for the helpers and nothing was done by the learned counsel for the defendants to test the veracity of such a claim.

According to PW4, he had helpers for over 12 months and then his wife had to do the job when he could not get anyone to work for him. Learned counsel for the infant plaintiff submitted that the value of the services rendered by the mother should be in the sum of RM350 per month. He said that such a sum was given in *Marappan*'s case.[11] As for the cost of future care, it was also submitted by learned counsel for the infant plaintiff that the multiplier should be 30 at the rate of RM350 per month thereby giving the total sum of RM126,000. Unfortunately the multiplier of 30 was not justified or substantiated.

For the defendants, learned counsel only submitted that the claim for RM260 per month for the helpers and the sum of RM126,000 were manifestly excessive. However, he failed to substantiate his contention.

Having seen and heard PW4, I have no reason to disbelieve him considering the condition of the infant plaintiff as described in the various medical reports and in the testimony of PW6.

I have therefore no doubt in the evidence of PW4 pertaining to the payments of helpers. It would also be expecting too much from PW4 if he should be required to produce receipts for the payments to the helpers or that the helpers should be called as witnesses. The consequence will only be a further delay in the disposal of this case and a continuing misery for PW4 and his family in having to shoulder the additional financial burden due to the condition of the infant plaintiff. Thus, I allow the claim of RM260 for 12 months as from 24 December 1987, making the sum of RM3,120. As from 1989 to the date of this judgment, I would consider the sum of RM300 per month to be sufficient in view of the fact that the mother of the infant plaintiff would nevertheless still have to take care of him (though not as intensive) even if he had not been injured. In coming to that figure I took

into account that the 'domestic element' should be excluded in order to avoid any risk of surplus payment instead of a fair and reasonable compensation for loss.

So the appropriate calculation is as follows: RM300 x 65 months (1989 to May 1994) = RM19,500.

As for the future cost of care, first, the issue of overlapping does not arise in this case as there is no claim for loss of future earnings. Secondly, according to Lord Scarmen in *Lim Poh Choo*'s case[10] at p 922:

> ... the estimate of damages under this head must proceed on the basis that resort will be had to capital as well as income to meet the expenditure; in other words, the cost of care, having been assessed, must be met by an award calculated on an annuity basis.

And thirdly, according to Lord Scarmen in *Lim Poh Choo*'s case[10] at p 923:

> ... the correct approach should be, therefore, in the first place to assess damages without regard to the risk of future inflation. If it can be demonstrated that, on the particular facts of a case, such an assessment would not result in a fair compensation (bearing in mind the investment opportunity that a lump sum award offers), some increase is permissible. But the victims of tort who receive a lump sum award are entitled to no better protection against inflation than others who have to rely on capital for their future support. To attempt such protection would be to put them into a privileged position at the expense of the tortfeasor, and so to impose on him an excessive burden, which might go far beyond compensation for loss.

Thus, bearing in mind the above precautions which should be taken into account, I will now consider what in my judgment should be the fair sum for the cost of future care and its multiplier. It is in evidence (PW6) that as a result of the injury, the physical condition of the infant plaintiff is deteriorating though uncertain as to the rate it is going on. Further, his life-span will be shorter when compared with a normal child.

In *Yang Salbiah*'s case,[14] the Federal Court gave a multiplier of 25 years' purchase on the sum of RM150 per month when the plaintiff was 12 years of age at the time of judgment. But in that case, it was accepted that the life-span of the plaintiff had not been shortened in contrast to the present case.

In *Marappan*'s case,[11] the multiplier was fixed at 16 on a sum of RM350 per month for the cost of future care. The multiplier of 16 as given under s 28A(2)(d)(i) of the Civil Law Act 1956 appeared to have been relied upon although the issue was on cost of future care. I note that the subsection only deals with loss of 'future earnings'.

As I have indicated earlier, the sum of RM300 per month should be a fair and reasonable compensation for the cost of care before this judgment. Thus, in my judgment that figure should also be sufficient, fair and reasonable for the cost of future care. And as for the multiplier, considering the circumstances of this case, the figure 10 should be in my judgment a fair one. In arriving at that figure 10, I am aware that it is a matter of discretion but in exercising my discretion, I have taken into account the following

elements, namely, the accelerated payment, the high probability that the infant plaintiff might not live a life-span which he would have if he had not been injured and the availability of capital as well as income to meet the cost of care. Further, in computing the total sum for cost of future care, a direct multiplier is also adopted in line with what was done in *Marappan*'s case.[11] Thus the sum for cost of future care is RM300 x 12 x 10 = RM36,000.

(3) SPECIAL DAMAGES

Learned counsel for the defendants did not dispute the expenses incurred when the infant plaintiff was brought to Singapore for further treatment. The total sum incurred was S$7,764.10. But it was the contention of the learned counsel for the defendants that the exchange rate should be at the time of loss and in this case, he submitted that it should be in February 1988 when the exchange rate was S$1 = RM1.24. The learned counsel for the infant plaintiff did not even bother to address the court on this issue.

No doubt the expenses were incurred in February 1988 but prior to this judgment, it could not be said that the sum was due and payable. Thus, in my judgment the relevant exchange rate to be taken should be as at the date of this judgment when the sum incurred can be said to be due and payable from the defendants. (See *Tiong Ing Chiong v Giovanni Vinneti*;[17] and *Ooi Han Sun & Anor v Bee Hua Meng*.[18])

As for some of the other expenses incurred by PW4 for the infant plaintiff, learned counsel for the defendants is not disputing them, namely:

(a) air fares to Singapore	RM520
(b) further hospital charges with receipts	RM46

The claim for payment of RM500 being hospital charges was disputed on the ground that no receipt of payment had been adduced. However there was a bill of RM500 issued by the Sarawak General Hospital which was tendered as exh P3. It is still unpaid as conceded by the learned counsel for the infant plaintiff. I am of the view that indeed there is money due to the hospital and as such I allow the claim for RM500 which sum must be paid to the hospital upon receipt.

As regard the claim for transport charges to and from the hospital on numerous occasions which is put at RM300, the learned counsel for the defendants objected to it due to lack of supporting documents. In my view, the parents were expected to visit the infant plaintiff while at the hospital. Furthermore, it is in evidence that the infant plaintiff has to be sent to the hospital for regular check-ups. In my judgment, therefore, the claim of RM300 should be allowed.

PW4 also testified that he purchased the following for the infant plaintiff:

(a) Wheelchair	RM980
(b) Bed (to aid blood circulation)	RM3,000
(c) Four units of reclining chairs at RM280 per unit	RM1,120

No receipts for these items were produced. But at the same time, learned counsel for the defendants did not dispute them. However, I am aware that in such a situation, it is still the burden of a plaintiff to prove his case. (See *Chong Khee Sang v Pang Ah Chee.*[19])

Having reviewed the evidence adduced there was obviously nothing to show that the bed costing RM3,000 was necessary and medically required. As such I disallow the claim. In respect of the wheel chair and the reclining chairs, I believed that PW4 bought them as they were required. The failure of PW4 to produce the receipts of purchases should not be taken in this case as fatal considering that he is just a village folk. After all, PW6 testified that the infant plaintiff is helpless and therefore a wheel chair should help for his movement. Accordingly, I allow the claim of RM980 and RM1,120 respectively.

Now I come to the claim for damaged clothing and shoes which has been put as RM50. No receipt was tendered to support the claim. Again I do not expect PW4 to come up with any receipt. No one could have anticipated that the shoes and the clothes which the infant plaintiff were wearing on that day would be a subject of a personal injury claim. Thus it is only fair that a certain amount of value should be given to the damaged clothes and shoes. In my judgment, the sum of RM20 should be sufficient for the damaged shoes and clothing.

The following were also claimed:

(a) Special food and nourishment	RM1,000
(b) Chinese medium	RM1,000
(c) Acupuncture	RM75
(d) Massage	RM720

For the above claims, no receipts were tendered and no medical advice was sought to determine if they were essential before such expenses were incurred. Accordingly, I disallow the claims.

G Conclusion on the quantum of damages

On the basis of 100% liability on the defendants, jointly and severally, the quantum of damages adds up to the following:

(a) For pain and suffering and loss of amenities	RM190,000
(b) Cost of nursing care (past and future)	
(i) to the date of this judgment	
(a) RM260 x 12 months	RM3,120
(b) RM300 x 65 months	RM19,500
Total	RM22,620
(ii) future cost: RM300 x 12 x 10 (10 being taken as the multiplier)	RM36,000

(c) Special damages

(i)	expenses incurred in Singapore and to be converted to Malaysian currency at the exchange rate prevailing at the date of this judgment	S$7,764.10
(ii)	air fares to Singapore	RM520
(iii)	hospital charges (additional)	RM46
(iv)	transport charges	RM300
(v)	hospital bill — to be paid	RM500
(vi)	cost of one wheelchair	RM980
(vii)	cost of 4 units of sliding chairs	RM1,120
(viii)	cost of damaged clothes and shoes	RM20

There shall also be interest at the rate of 6%pa on the general damages for pain and suffering and loss of amenities from the date of service of writ to the date of this judgment. And of course the judgment debt will carry the usual interest of 8%pa from the date of this judgment until satisfaction pursuant to O 42 r 12 of the Rules of the High Court 1980.

Costs of this action to be paid to the infant plaintiff by the defendants jointly and severally.

Finally, the sums of RM190,000 and RM36,000 are to be paid to the Public Trustee with liberty to apply.

Order accordingly.

Reported by Anne Khoo